IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8587 of 1998
WITH
SPECIAL CIVIL APPLICATION No 3326 of 1998
WITH
SPECIAL CIVIL APPLICATION No 1548 of 1998
WITH
SPECIAL CIVIL APPLICATION No 9461 of 1996
WITH
SPECIAL CIVIL APPLICATION No 9492 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VIRENDRAKUMAR JAYANTILAL GANATRA

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

1. Special Civil Application No. 8587 of 1998
MR BHASKAR P. TANNA, SR. ADVOCATE with MS MAHROOK KERRAVALA, ADVOCATE for TANNA ASSOCIATES for Petitioner
MR NK MAJMUDAR and MR HS MUNSHAW for Respondent No. 1-2

MR MH RATHOD for Petitioners in rest of the matters.

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 01/04/2004

CAV JUDGEMENT

1. This group of petitions is filed by the former employees of the respondent - Gujarat Electricity Board (hereinafter referred to as 'the Board'), whose services have been terminated by the Board by resorting to Regulation No. 113 of the Services Regulations which have been framed by the Board in exercise of powers conferred by section 79 (c) of the Electricity (Supply) Act, 1948 (hereinafter referred to as 'the Regulations'). The said regulation has been pressed into service to summarily discharge the petitioners from service on the ground of continued absence from service despite warning to return to duty. In all cases except one the petitioners who had been transferred out of their circle had not joined the duty at the transferred place despite intimations/notices having been given to them by the Board. Their absence on duty at the place of transfer was, therefore, treated as continued absence from duty under Regulation 113 of the Regulations and their services were terminated on that ground.

1.1. In one case the petitioner had gone abroad without waiting for the grant of permission to proceed on leave by the superior officer and the same was treated to be continued absence from duty without prior permission of the concerned authority which made her liable to be discharged from the service in view of Regulation 113 and accordingly she was discharged from the service. The facts of each case would be discussed in detail little later in this judgment.

1.2. Since Regulation 113, which has been resorted to by the Board to bring about the end of the services of the petitioners, it has now become the main target of attack of the petitioners. It is, therefore, required to be reproduced verbatim. It reads as under :-

> Regulation-113 : Continued absence from duty or overstay, inspite of warning, to return to duty, shall render the employee liable to summarily discharged from service without the necessity of proceedings under the Gujarat Electricity Board Conduct, Discipline and appeal procedure.

Obviously now the controversy is whether termination of the services of the petitioners with the help of Regulation 113 is just, proper and valid in light of the contentions that have been raised in the petitions and the submissions made during the course of hearing by the counsels for the parties.

2. Mr. B.P. Tanna, learned Senior Advocate appearing for the petitioner in Special Civil Application No. 8587 of 1998 has submitted that in his case the termination of service is not by way of simple discharge, but it is an order of dismissal which is passed by way of penalty treating the unauthorized absenteeism as act of misconduct and, therefore, the requisite procedure under the provisions of the Gujarat Electricity Board (Conduct, Punishment and Appeal) Rules (hereinafter referred to as 'the Conduct and Appeal Rules') ought to have been followed. He has further submitted that even if the impugned order amounts to discharge simpliciter in accordance with the provisions of the Regulation 113, it would be 'retrenchment' as defined under the provisions of section 2 (oo) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the I.D. Act') and before effecting the retrenchment, the Board was required to follow the procedure prescribed by the provisions of Section 25 (F) of the I.D. Act, but the same has not been followed and, therefore, the impugned order is bad in law. He has further submitted that service of permanent employee who has been in the establishment since long cannot be terminated without affording to him an opportunity of hearing. In other words, according to him, in such case the minimum requirement of following the principles of natural justice has to be complied with and when that is not done, the act becomes violative of principles of natural justice and hence bad in law. He has further submitted that the Regulation 113 is violative of Articles 14, 16, 19 (1) (g) and 21 of the Constitution of India and it is required to be declared ultra-vires the aforesaid constitutional provisions. Lastly he has submitted that since the impugned order has not been passed by the competent authority, it is required to be quashed and set aside.

2.1. Mr. M.H. Rathod, learned advocate appearing for the petitioners in Special Civil Applications Nos. 3326/1998, 1548/1998, 9461/1996 and 9492/1996 has contended that considering the facts and circumstances of the case, it is clear that the termination of the services has been brought about by way of penalty and, therefore, the requisite procedure as prescribed under the Conduct and Appeal Rules ought to

have been followed. He has further submitted that in view of the Board's policy, Class-III or Class-IV employee could not be transferred outside his Circle unless there were compelling circumstances which have been adequately described in the said policy. According to him, in the instant case, no such compelling circumstances existed requiring Board to transfer the petitioners outside their Circle and therefore, the petitioners were justified in not reporting on duty at the transferred place and their absence could not have been termed as continued absence from duty or unauthorized absence. So far the legal submissions are concerned, he has adopted the submissions made by Mr. Tanna in toto.

2.2. As against that, Mr. N.K. Majmudar and Mr. H.S. Munshaw, learned advocates appearing for the Board have submitted that the Regulations have been framed by virtue of the power conferred on the Board by the provisions of the Electricity (Supply) Act and, therefore, these Regulations have force of a statute. They have further submitted that since Regulation 113 is also part of the Regulations, it has got force of law and the Board could resort to said provision in appropriate cases and pass order of discharge from service against the defaulting employee. They have further submitted that since the provisions of Regulation 113 do not envisage holding of any inquiry or following the procedure laid down under Section 25 (F) of the I.D. Act, the Board was empowered to pass order of discharge simpliciter and dispense with the aforesaid procedure. According to them, such discharge even did not amount to retrenchment under Section 2 (oo) of the I.D. Act and no compliance of the provisions of section 25 (F) was required to be made before passing the impugned orders. They have also submitted that in view of the decision rendered by the Apex Court in the case of Gujarat Electricity Board v/s. Atmaram Poshani reported in AIR 1989 S.C. at page 1433, in which the Apex Court was required to consider Regulation 113 and the order discharging the employee from service under that provision; and the said order was held to be valid, the issue regarding its validity stands concluded. In other words, it is submitted by them that when the Apex Court has upheld the order of termination of service which was passed without following any procedure under section 25 (F) of the I.D. Act or without compliance of principles of natural justice, it is clear that no such requirement is to be complied with. Lastly they have submitted that facts of each case would show that impugned orders were just and proper and there was no reason for interference

by this Court with the orders of termination of the services and the petitions be dismissed.

2.3. Both the sides have placed reliance on various decisions of this Court and the Apex Court. I will refer to them in the course of the judgment.

3. Since the question regarding validity of Regulation 113 has been raised in these petitions and the same has been challenged on the ground of it being violative of constitutional provisions, in particular of Articles 14, 16, 19 (1)(g) and 21 of the Constitution of India, I will first examine the impugned provision of the Regulations from that angle.

3.1. It may be noted here that so far the counsels for respondent-Board are concerned, they have submitted that the question with regard to validity of Regulation 113 stands concluded by virtue of the Apex Court's decision rendered in the case of GEB V/s. Poshani (supra). However, the said submission cannot be accepted because in para. 5 of the said judgment, the Apex Court has observed as under :-

> "5. It is note-worthy that the validity of Regulation 113 was not challenged before the High Court and the parties proceeded on the assumption that Regulation 113 was valid and applicable to the respondents' service."

The said Regulation was not challenged even before the Apex Court. It was only the order passed against Mr. Poshani that was challenged on the ground of noncompliance of principles of natural justice. In view of the aforesaid observations made by the Apex Court, it is clear that the question regarding validity of Regulation 113 has been kept open.

3.2. Before I embark upon the detailed examination of this issue, it will be worthwhile to refer to the transfer policy relating to employees of Class-III and IV and the provisions regarding absence without leave, over stay of leave, etc., contained in the Regulations and the Board's Conduct, Discipline and Appeal Rules, apart from Regulation 113.

3.3. The Board itself has evolved a policy governing/regularising transfer of Class-III and IV employees. It is adequately contained in a letter, which has been addressed to the Superintending Engineer. (O & M), G.E.B. C.O. Jamnagar dated 23rd October, 1996 by

Addl. Chief Engineer (WZ), Rajkot, the contents thereof are required to be reproduced in toto. The same are as follows:-

Confidential G.E.B. Zonal Office,
Rajkot Dt. 23/10/96.

No.:RZ/Est/TRF/96/525

To
The S.E. (O&M),
GEB : C.O., Jamnagar,

Sub : Out of Circle tranfers on administrative grounds

"It has been observed that in many cases proposals for out of Circle transfers of employees are received without strong justification for such an action or without supporting documents.

As far as possible transfer on administrative reasons should be made within the Circle, so that the employee concerned may realise his mistake. If he is involved in any serious act or misconduct, disciplinary action as per the procedure must be taken as otherwise such an action is likely to reflect prejudicial action.

Transfer out of Circle should be resorted to in rare cases. Grounds should be very justifiable, Documentary evidence should also support the proposal while reading such proposal to this office, such documents and incidents of indisciplined behaviour by the employes, previous transfer within the circle, charge-sheet given etc., should be categorically furnished. Thereby, it should be established that there is full justification for proposal. In such all type of cases, the disciplinary action procedure should follow without fail.

Above guidelines may please be kept in view while dealing such cases."

sd/-
Addl. Chief Engineer (WS)
Rajkot

c.f.w. cs. to :-
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The I/c. G.M. (HRD), GEB: No : Baroda.

It is not disputed that the aforesaid communication regarding transfer outside the Circle is made in relation to Class-III and Class-IV employees. The policy, therefore, lays down that only in rare cases the transfer of such employee out of the circle should be resorted to. It is only in cases where the concerned employee is involved in any serious act or misconduct proposal for transfer outside the circle can be submitted. Further alongwith the proposal, documentary evidence referred to in the policy should be categorically furnished in support of the proposal to the concerned office. Then only transfer outside the Circle could be made. In fact the policy lays down that it should be established that there is full justification for transfer outside the circle and in all such type of cases the disciplinary action procedure should be followed without fail.

3.4. So far the absence from duty without prior permission (unauthorized absenteeism) or even overstaying the period of sanctioned leave is concerned, it is dealt with in the following Regulations, which are as under :-

Regulation 148: If in the opinion of the authority competent to sanction casual leave, an employee has either overstayed the period of casual leave sanction to him or has absented himself without prior permission, without sufficiently satisfactory reasons or is found to be in habit of absenting himself frequently from duty inspite of warning absence will not be treated as casual leave and will be treated as a breach of discipline.

Regulation-236: Any act of misconduct or breach of discipline shall be punishable to the extent provided under these regulations few of such acts of misconduct or breaches of discipline are mentioned below as indicative of the nature of such acts and breaches.

(a) Unpunctuality and irregular attendance or absence without permission.

xxx xxx xxx xxx

Regulation 237 provides for various punishments which reads as under :-

Regulation-237: Without prejudice to the provisions of any law for the time being in force, employee who is found to be guilty of any acts or of misconduct or or any breach of discipline, is punishable as indicated below according to the gravity of the breach of misconduct. The punishment will not only depend on the findings in the case under review, but also on his past record.

(i) Warning.

(ii) Reprim and or censure

(iii) Withholding increments for a specified period.

(iv) fine upto the limit that may be prescribed by the Board.

(v) Reduction to a lower post.

(vi) recovery of the loss from the emoluments of the employee upto the limit that may be prescribed by the Board.

(vii) Suspension

(viii) Removal from the service.

(ix) Dismissal which may result in disqualifying the employee from any Govt., or semi Government employment.

Regulation 238 provides for the procedure for dealing with cases of acts of misconduct and breaches of discipline. The same reads as under :-

Regulation-238 : The Board may prescribe a procedure for dealing with cases of acts of misconduct and breaches of discipline, and appropriate authorities to hold inquiries and to impose punishments or to order any disciplinary action and also to hear appeals.

Gujarat Electricity Board Establishment Manual, which deals with Board's employees conduct, discipline and appeal procedure. Clause 4 thereof deals with classification of offences, which classifies the offences committed by the employees in the following two categories, namely (a) acts of misconduct and (b) minor lapses and delinquencies. The acts of misconduct are described in Schedule-A; whereas minor lapses and delinquencies are enumerated in Schedule-B. Items nos. 14, 15, 16 and 17 of Schedule-B deal with absenteeism in one form or the other. They are as under :-

SCHEDULE - B

MINOR LAPSES AND DELINQUENCIES :-

(14) Staying away on casual leave without sufficient ground and satisfactory explanation.

(15) Asking for extension while on leave without sufficient cause.

(16) Overstaying leave.

(17) Absence without prior permission.

Thus the instance of remaining absent without permission of the concerned authority in any of the aforesaid forms is classified as minor lapse and delinquency. Clause 9 provides for punishments in connection with minor lapses and delinquencies, which reads as under :-

Clause 9-Punishments : The following limits are prescribed for minor lapses delinquencies and acts of misconduct according to the gravity of each case :-

Name of offence	Punishment	Appealable non appealable
(1) Minor lapses & delinquencies	(a) Warning (b) Reprimand	Non-appealble
(c) Fine upto 1/10 of the basic pay	(i) non-appealable if fine is less than Rs.5	
	(d) Recovery from pay	

to make up wholly or partly the pecuniary loss caused to the organisation the due to negligence or breach of orders (amounts less than Rs.50).	Appealable	

Thus, it can be seen that the unauthorized absenteeism has been dealt with by the Board in two different ways; firstly under regulation 113 it has been considered as a ground to render concerned employee liable to summarily discharged without following any proceedings under the Board's conduct, discipline and appeal procedure when the absence from duty is continued one and despite warning it is not resumed; and secondly it has been treated as minor lapse or delinquency entailing imposition of certain punishments. In other words, in the first category the unauthorized absenteeism is neither treated as misconduct nor as minor lapse or delinquency; whereas in the second category it has been treated as a minor lapse and delinquency requiring imposition of one of the aforesaid punishments. Clause 5 provides for procedure for dealing with minor lapses and delinquencies and also the competent officer to take action against the defaulting employee. It reads as follows :-

Clause 5 : Procedure for dealing with minor lapses and delinquencies :

(a) Cases of minor lapses and delinquencies may be summarily dealt with without he necessity of following the procedure in clause 6 and warning or reprimand may be issued or a fine imposed, provided, however, the employee's explanation in writing should normally be obtained whenever a fine is imposed. Any reprimand or fine imposed by the appropriate authority shall be entered into the personnel trocord of the employee.

(b) The following are the competent officers to act under sub-clause (a) :-

Class if Employees	Competent Authority

(i) Class III & IV Employees — Branch Head in Head Office Executive Engineer or officer incharge of the respective operating or construction unit in the divisions.

(ii) Class II Officers — Secretary non technical Officers. Chief Engineer for Technical Officers.

(iii) Class I Officers — as in (ii) above but in consultation with Chairman

Apart from this, there does not seem to be any other provision regarding absence without leave, atleast my attention has not been drawn to it by the any of the counsels appearing for the parties.

3.5. The reading of two different provisions would make it clear that so far Regulation 113 is concerned, it requires no procedure to be followed for relieving the defaulting employee from service if such employee has remained on leave without permission of the concerned officer and despite warning to resume the service, has not done it. When absence without permission or overstaying the sanctioned leave is treated as misconduct or breach of discipline under the Board's employees Conduct, Discipline and Appeal procedure, for such absenteeism certain procedure as envisaged under clause 5 is required to be followed by the competent authority and upon the default being established, one of the punishments including that of levy of fine, prescribed in clause 9 has to be imposed. It may also be seen that so far regulation 113 is concerned, against the decision of the competent authority no appeal has been provided for. As against that, in the second category only in the case of warning or imposition of fine of less than Rs.5/= appeal has not been provided for; otherwise against all the orders of penalty there is a provision of appeal.

3.6. Aforesaid policy of the transfer outside the circle and various provisions are now required to be kept in view while discussing the issue regarding validity of Regulation 113.

3.7. By now the factors which are required to

be taken into consideration for examining the issue regarding validity of any statute, provision of the statute or rules or regulations having statutory force vis-a-vis aforesaid provisions of the Constitution have been well defined by the Apex Court. Broadly speaking, they can be stated as under :-

I. Whether the impugned provision is arbitrary, discriminatory and unguided.
II. Whether it violates principles of natural justice.
III. Whether it is unreasonable.
IV. Whether it is against public policy and public interest.
V. Whether it is unfair and/or unconscionable.

Keeping in view the aforesaid factors, I will now examine the constitutional validity of Regulation 113.

I. Whether the impugned provision is discriminatory, arbitrary and unguided.

WHETHER IT IS DISCRIMINATORY :

4. Simple reading of Regulation 113 will show that in the event of continued absence from duty or overstay inspite of warning to return to duty, shall render the concerned employee liable to summarily discharged from service. It also provides that no proceedings under the Board's Conduct, Discipline and Appeal Procedure would be required to be followed. There is another category of unauthorized absentees as covered under Regulation 236 Clause (a). Though these provisions are termed in different ways, they essentially relate to absence without permission. It is true that Regulation 113 envisages that inspite of warning if the concerned employee did not return to duty, the consequences mentioned therein would follow. In Regulation 236 Clause (a) no such indication has been given. In both the provisions no particular time limit is prescribed. In other words, after what specified period or duration of absence the defaulting employee will be liable to be dealt with either under Regulation 113 or Regulation 236(a). Regulation 236(a) even does not say whether it is only applicable to the cases of the employee later on joining the duty either on account of the warning or for any other reason or even to the cases where despite notice employee has not joined the duty. Clause (a) of Regulation 236 only says absence without prior permission and nothing more. In Regulation 113 words 'continued

absence from duty' would mean absence from duty without leave as said by the Apex Court in Poshani's case. Clause (a) of Regulation 236 deals with cases of unpunctuality, irregular attendance and absence without permission. The irregular attendance and absence without permission are separately mentioned. Irregular attendance means frequently remaining absent without permission. Absence may be of short duration. Irregular attendance and unpunctuality are described in Regulation 224 as acts of breach of discipline. Absence without permission may even be for longer period. Power to treat it as breach of discipline is conferred upon Competent Authority under Regulation 148. Ofcourse it deals with casual leave which can be permitted for maximum five days at a time which in extraordinary circumstances can be extended upto 8 days not beyond that as per Regulation 147. It may be noted here that Regulation 148 also includes category of employees who habitually remain absent despite warning. In such circumstances, there is ample scope for discrimination, deliberate or otherwise. In a given case, an employee may be treated as a defaulter under Regulation 113 and in another he may be treated as a employee committing breach of discipline under Regulation 236 (a). So far the consequence under Regulation 113 is concerned, the defaulting employee renders himself liable to summarily discharged from service; whereas if it is considered to be a breach of discipline under Regulation 236 (a), such employee escapes with minor punishment. Thus, it is quite possible that concerned officer at one place may deal the defaulting employee, who has not resumed even after notice to do so, under Regulation 113; whereas officer at some other place, may treat it as an act of misconduct or breach of discipline under Regulation 236 (a), which as per clause (9) of the Board's Conduct, Discipline and Appeal Procedure would entail imposition of minor punishment. There is every possibility of the employees standing on the same footing at different places getting different treatment, which would amount to discrimination.

4.1. It may further be noted that by virtue of default under Regulation 113, the action which may be taken against such employee would result into termination of his service without affording to him any opportunity, much less reasonable opportunity of even rendering explanation for not resuming duty after warning. As against that, in the cases of termination of services by way of penalty, opportunity of defending his interest is being afforded to the concerned employee. It is true that the act of serious misconduct which can be visited

with punishment of termination of service and default envisaged under Regulation 113 stand on different footing, but in one case complete procedure is required to be followed giving ample chance to the delinquent to defend him; whereas in the other no scope whatsoever on this line is available to the concerned employee.

4.2. There is one more aspect of this issue. Word "liable to summarily discharged" occurring in Regulation 113 would show that discretion is conferred upon the concerned officer whether to terminate or not to terminate services of an employee. There is no guideline prescribed in which case services should be terminated and in which it should not be done. Two officers at two different places may apply different yardstick for taking decision in same sets of circumstances. As I will presently show the powers flowing from Regulation 113 are absolutely unguided. Such situation would certainly give rise to discrimination between two defaulting employees. It can also give ample scope for exercising discretion in arbitrary and capricious manner.

Thus Regulation 113 can be termed as discriminatory.

WHETHER IT IS ARBITRARY

4.3. Plain analysis of Regulation 113 will show that there is ample scope for the concerned officer to act in a arbitrary manner while exercising power under said regulation. According to the Apex Court in Poshani's case only two conditions should exist before Regulation 113 is resorted to viz. (1) absence from duty without leave or overstay of leave period and (2) despite warning to resume duty, not joined. No hearing to concerned employee to be given and no procedure to be followed. No appeal is provided for. The cases on hand are the glaring examples of arbitrariness of the concerned officers. As can be seen from the Board's policy regarding transfer of its Class-III and IV employees, it almost imposes prohibition against such employee being transferred outside his circle. It also states that under what circumstances such proposals are required to be made and while making such proposals the documentary evidence with regard to indisciplined behaviour, previous transfer within the circle, charge-sheet given, etc. are required to be furnished. Despite that, facts of these petitions show that any employee, who has fallen from the grace of superiors or who is included in their black list can be transferred outside his circle and when any protest is made by way of representation, he is served with notice to resume the duty at transferred place and when that is not done,

power under Regulation 113 is exercised to get rid off him. Since facts of individual cases are discussed little later in this judgment, I am not dealing with them here. It is only because these petitioners have protested and approached this Court instances of arbitrariness have come to light.

4.4. There may be number of other employees who may have not only meekly joined duty at the transferred place, but may not have even raised voice against such transfer so as to avoid any confrontation with higher officers. Such uncontrolled power conferred upon the officer by Regulation 113 can be exercised in arbitrary manner or it can even be misused. It may be stated that there is presumption regarding high officers that they would not behave in arbitrary manner, but such presumption would not prevail if provisions do not enjoin them to observe principles of natural justice while taking adverse action. Thus, considering the fact that the Regulation 113 neither contemplates issuance of show cause notice before discharging the concerned employee from service nor observance of principles of natural justice nor order under it is made appealable, there is every possibility that such power under Regulation 113 can be exercised in arbitrary and capricious manner. So on this count also my answer is in affirmative.

WHETHER IT IS UNGUIDED :

4.5. There is one more glaring defect in this provision. It is completely silent on the period of absence. It does not specify upon what duration of absence concerned employee can be served with the warning/notice for joining the duty and how many days' absence even after service of notice/warning would render him liable to be discharged from service. In Regulation 113, opening words are "continued absence from duty or overstay inspite of warning". Thus, it would mean that the absence without leave from duty or overstay that had commenced before issuance of warning had even continued thereafter. It could be for some days, for some weeks or even for some months. Thus one officer may issue warning within a week of absence from duty without permission and thereafter, after service of warning, within a week, pass order under Regulation 113 in the event of such employee failing to join the duty, because both the conditions are fulfilled. Normally warning is being given to join the duty forthwith. If such employee is facing some genuine difficulty he may not be able to give any response to the warning or comply with it. By the time he is in a position to resume the service, it is too late. In

another case, officer may take his own time i.e. much longer time than his counterpart at both i.e. pre-warning and post warning stages, which may give the delinquent adequate opportunity to resume before order under Regulation 113 is passed.

4.6. Further the Regulation does not give any indication who has to exercise these powers unlike Regulation 236(a) read with clause 5 of the Board's Conduct, Discipline and Appeal Rules which gives complete table regarding competent authorities. Regulation 113 does not give any guidance on these aspects. When the power to terminate services of a permanent employee without following any procedure flow from this regulation, at least it should specify who shall exercise such uncontrolled powers.

4.7. As already noted above, though exercise of power is discretionary, no guidelines have been provided in what circumstances such power is to be exercised.

4.8. The aforesaid discussion would, therefore, show that the provision is not only discriminatory but the action that may be taken under said provision can be arbitrary and capricious; and the powers emanating from Regulation 113 can be termed as unguided.

II Whether it violates the principles of natural justice.

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5. It is submitted by the counsels for the respondents that in Poshani's case (supra) the Apex Court has decided that under the Regulation 113 only two conditions are required to be satisfied before the power is exercised, firstly the employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave and secondly despite warning he does not join the duty. Therefore, according to them, it is very clear that even in the opinion of the Apex Court nothing more is required to be done. However, as already stated above, the Apex Court, while dealing with impugned orders passed under Regulation 113 had proceeded on the basis that the said Regulation was valid and applicable to the respondent therein. It has made it clear that it had proceeded on such basis because the validity was not challenged before the High Court. The Apex Court had, therefore, examined question regarding compliance of

principles of natural justice in relation to order impugned in that case and not vis-a-vis validity of the provision. When in these petitions the validity of said provision is also challenged on the ground of it being violative of principles of natural justice, it is necessary for me to examine the issue from that angle.

5.1 The question is whether, while passing order under Regulation 113 against an employee of the Board, any opportunity of hearing is required to be afforded to him. In other words, whether compliance of principles of natural justice is mandatory before passing any order under Regulation 113. A simple reading of Regulation 113 would show that the employee would become liable to be summarily discharged from service without following the requisite procedure under the Conduct, Discipline and Appeal Rules if he remained absent from duty or overstayed inspite of warning to return to duty; meaning thereby it confers power on the Board to summarily discharge an employee who has continued to remain absent from duty or overstayed sanctioned leave despite warning to join the duty. While considering the provisions of this Regulation, the Apex Court in the case of Gujarat Electricity Board v. Atmaram Poshani has held that before resorting to Regulation 113 the Board has to take into consideration mainly two factors, namely (1) that the employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave and (2) he failed to join his duty even after a warning. The Apex Court has, therefore, said that when these two factors exist in a case, the Board is authorized to pass order under Regulation 113 without doing anything more. This appears to be the only case in which Regulation 113 of the Regulations has been considered by the Apex Court, as no other decision relating to Regulation 113 has been cited by any of the learned advocates.

5.2. However, such analogous provision in different statutes has come under the scrutiny of the Apex Court often and after considering various aspects of this issue in light of the earlier decisions, the Apex Court has expressed a view that when the service of a permanent employee is being brought to an end, the minimum that could be done is observance of principles of natural justice. In the case of Uptron India Ltd. v. Shammibhan reported in 1998 (6) S.C.C. page 538 it has been held as under :-

"Conferment of permanent status on an employee guarantees security of tenure. It is now well

settled that services of a permanent employee whether employed by the Government or Government company or Government instrumentality or statutory Corporation or any other authority within the meaning of Article 12 cannot be terminated abruptly and arbitrarily, either by giving him a month's or three months' notice or pay in lieu thereof or even without notice, notwithstanding that there may be a stipulation to that effect either in the contract of service or in the certified standing orders."

5.3. The Apex Court has also taken into consideration that the impugned provision relating to condition of service of an employee in that case, viz. clause 17 (g) of the Standing Orders, which reads as under :-

"Services of workman are liable to automatic termination if he overstays on leave without permission for more than seven days. In case of sickness, the medical certificate must be submitted within a week."

It has declared it to be violative of Article 14 of the Constitution of India as it was capable of vicious discrimination. However, so far the issue regarding compliance of principles of natural justice is concerned, the view of the Apex Court is that the same was required to be followed before passing any order terminating the service. This can be clearly gathered from the following passage :-

"20. There is another angle of looking at the problem. Clause 17(g), which has been extracted above, significantly does not say that the services of a workman who overstays the leave for more than seven days shall stand automatically terminated. What it says is that "the services are liable to automatic termiantion". This provision, therefore, confers a discretion upon the management to terminate or not to terminate the services of an employe who overstays the leave. It is obvious that this discretion cannot be exercised, or permitted to be exercised, capriciously. The discretion has to be based on an objective consideration of all the circumstances and material which may be available on record. What are the circumstances which compelled the employee to proceed on leave; why he overstayed the leave; was there any just and reasonable cause for overstaying the leave;

whether he gave any further application for extension of leave; whether any medical certificate was sent if he had, in the meantime; fallen ill? These are questions which would naturally arise while deciding to terminate the services of the employee for overstaying the leave. Who would answer these questions and who would furnish the material to enable the management to decide whether to terminate or not to terminate the services are again questions which have an answer inherent in the provision itself, namely, that the employee against whom action on the basis of this provision is proposed to be taken must be given an opportunity of hearing. The principles of natural justice, which have to be read into the offending clause, must be complied with and the employee must be informed of the grounds for which action was proposed to be taken against him for overstaying the leave."

In para. 25 again it has been held by the Apex Court as under :-

"25. In view of the above, we are of the positive opinion that any clause in the Certified Standing Orders providing for automatic termination of service of a permanent employee, not directly related to "production" in a factory or industrial establishment, would be bad if it does not purport to provide an opportunity of hearing to the employee whose services are treated to have come to an end automatically."

In the case of Uptron India Ltd. the Apex Court has considered its earlier decision rendered in the case of Central Inland Water Transport Corporation Ltd. v/s. Brojo Nath Ganguly reported in AIR 1986 S.C. page 1571 in para. 99. It reads as under :-

"99. No apter description of Rule 9(i) can be given than to call it "the Henry VIII Clause". It confers absolute and arbitrary power upon the Corporation. It does not even state who on behalf of the Corporation is to exercise that power. It was submitted on behalf of the Appellants that it would be the Board of Directors. The impugned letters of termiantion, however, do not refer to any resolution or

decision of the Board and even if they did, it would be irrelevant to the validity of Rule 9 (i). There are no guidelines whatever laid down to indicate in what circumstances the power given by Rule 9(i) is to be exercised by the Corporation. No opportunity whatever of a hearing is at all to be afforded to the permanent employee whose service is being terminated in the exercise of this power. It was urged that the Board of Directors would not exercise this power arbitrarily or capriciously as it consists of responsible and highly placed persons. This submission ignores the fact that however highly placed a person may be he must necessarily possess human frailties. It also overlooks the well-known saying of Lord Action, which has now almost become a maxim, in the Appendix to his "Historical Essays and Studies", that "power tends to corrupt, and absolute power corrupts absolutely." As we have pointed out earlier, the said Rules provide for four different modes in which the services of a permanent employee can be terminated earlier than his attaining the age of superannuation, namely, Rule 9(i), Rule 9(ii), subclause (iv) of clause (b) of Rule 36 read with Rule 38 and Rule 37. Under Rule 9(ii) the termination of service is to be on the ground of "Services no longer required in the interest of the Company." Sub-clause (iv) of clause (b) of Rule 36 read with Rule 38 provides for dismissal on the ground of misconduct. Rule 37 provides for termination of service at any time without any notice if the employee is found guilty of any of the acts mentioned in that Rule. Rule 9(i) is the only Rule which does not state in what circumstances the power conferred by that Rule is to be exercised. Thus even where the Corporation could proceed under Rule 36 and dismiss an employee on the ground of misconduct after holding a regular disciplinary inquiry, it is free to resort instead to Rule 9(i) in order to avoid the hassle of an inquiry. Rule 9(i) thus confers an absolute, arbitrary and unguided power upon the Corporation. It violates one of the two great rules of natural justice - the audi alteram partem rule. It is not only in cases to which Article 14 applies that the rules of natural justice come into play. As pointed out in Union of India etc. v. Tulsiram Patel etc.. [1985] 3 S.C.C. 398 (at page 463), "The principles of natural justice are not the creation of Article

14. Article 14 is not their begetter but their constitutional guardian." That case has traced in some detail the origin and development of the concept of principles of natural justice and of the audi alteram partem rule (at pages 463 480). They apply in diverse situations and not only to cases of State action. As pointed out by 0. Chinnappa Reddy, H 378 J., in Swadeshi Cotton Mills v. Union of India, [1981] 2 S.C.R. 533, 591 they are implicit in every decision-making function, whether judicial or quasi-judicial or administrative. Undoubtedly, in certain circumstances the principles of natural justice can be modified and, in exceptional cases, can even be excluded as pointed out in Tulsiram Patel's case. Rule 9(i), however, is not covered by any of the situations which would justify the total exclusion of the audi alteram partem rule . Thus, in Inland Water Transport Corporation Ltd. the Apex Court has very clearly laid down that only in exceptional cases the principles of natural justice can be excluded but normally it is required to be followed.

5.4. In the case of Delhi Transport Corporation v/s. DTC Mazdoor Congress and others reported in 1991 (Suppl.) (1) S.C.C. page 600 the Apex Court had an occasion to consider Regulation 9(b) of Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, which prescribed as under:-

"Termination of service -

(b) Where the termination is made due to reduction of establishment or in circumstances other than those mentioned at (a) above, one month's notice in writing or pay in lieu thereof will be given to all category of employees."

The Apex Court has held with reference to that provision as under :-

"274. It must, therefore, be held that a permanent employee of a statutory authority, corporation or instrumentality under Article 12 has a lien on the post till he attains superannuation or is compulsorily retired or service is duly terminated in accordance with the procedure established by law. Security of tenure enures the benefit of pension on retirement. Dismissal, removal or termination of his/her service for inefficiency, corruption or other

misconduct is by way of penalty. He/she has a right to security of tenure which is essential to inculcate a sense of belonging to the service or organization and involvement for maximum production or efficient service. It is also a valuable right which is to be duly put an end to only as per valid law."

In the instant case the unauthorized absenteeism has been considered as minor lapse or delinquency as per the Establishment Manual of the Board and at the same time it has also been considered as act of misconduct or breach of discipline as per the service regulation which can be visited with appropriate punishment prescribed in the Regulations. It is also contained in Regulation 113 where the act of unauthorized absenteeism is considered to be a ground for passing order of discharge from the service without following any procedure. It is, therefore, incumbent upon the Court to see by lifting the veil and find out whether the action terminating service of concerned employee has been taken by way of discharge simpliciter, in reality is by way of punishment. If that be so, then as stated above by the Apex Court, the procedure of affording hearing to the concerned employees is required to be followed.

5.5. In the case of M/s. National Aluminium Co. Ltd. v/s. Deepak Kumar Panda & ors reported in 2002 AIR SCW at page 2808 the Apex Court has held as under:-

"3 As regards the first contention that on account of unauthorized absence of the respondent, his services automatically stood terminated in terms of Cl. (31) of the Standing Orders, no exception can be taken to the conclusion reached by the High Court. The High Court rightly held that even on admitted facts, S.O. (31) was not attracted. Further, it is not the case of the petitioner that any decision was taken on the leave application submitted by him by the date of the impugned order or that the ground of sickness urged by the respondent was negatived. This is apart from the question whether there could be, in law, automatic termination of service without enquiry or even show cause notice."

5.6. The answer to this question can be had from the decision in the case of Scooters India Ltd.

v/s. M. Mohd. Yaqub reported in 2001 (1) L.L.J. at page 7 wherein the Apex Court, while considering the standing order, has held as under :-

> "That there could be no automatic termination in the service of a workman who has remained absent without leave on the basis of the standing order. In such case principles of natural justice had to be complied with."

5.7. In the case of M/s. Lakshmi Precision Screws Ltd. Ltd. v/s. Ram Bhagat reported in 2002 AIR SCW page 3324, the Apex Court has held as under :-

> "16. Having regard to the well settled principle of law as in Yadav (Supra), the decision to terminate by reason of a presumption as noticed above, we cannot but lend concurrence to the conclusion of the High Court that the action is purely and surely arbitrary in nature. Arbitrariness in an anti-thesis to rule of law; equity: fair play and justice - contract of employment there may be but it cannot be devoid of the basic principles of the concept of justice. Justice oriented approach as is the present trend in Indian jurisprudence shall have to read as an in-built requirement of the basic of concept of justice, to wit, the doctrine of natural justice, fairness, equality, and rule of law; The letter dated 17th October cannot by any stretch be treated to be an opportunity since it is only on the fourth day that such a letter was sent - the action of the appellant herein stands out to be devoid of any justification, neither it depicts acceptability of the doctrine of natural justice or the concept of fairness arbitrariness is written large and we confirm the finding of the High Court as also that of the learned Trial Judge and the Tribunal as regards issue as noticed above."

5.8. Thus considering the aforesaid decisions, it becomes crystal clear that when the service of a permanent employee is required to be terminated, even on the ground of remaining absent from duty without prior permission of the concerned authority, the minimum requirement of principles of natural justice by issuing a show cause notice is to be followed.

5.9. It is sought to be contended by the counsels for the respondents that when the warning under

Regulation 113 is issued, said warning itself gives opportunity to the concerned employee to render explanation for his unauthorized absence and, therefore, no further opportunity is required to be given, particularly when the Apex Court has so laid down. It is to be noted that the conclusion reached by the Division Bench of this Court was factually found to be incorrect on both the counts. In para. 9 it has observed -

"We further hold that before issuing the order of discharge, the respondent was not only warned but he was also afforded an opportunity as to why disciplinary action should not be taken against him."

Thus in Poshani's case warning as well as show cause notice were separately given and the Apex Court on that count also held that there was compliance of principles of natural justice. In that case Apex Court held that letter dated 18th April, 1974 was warning under Regulation 113 and by letter dated 24th April, 1974 opportunity was given to him why disciplinary action should not be taken against him.

Now what is sought to be contended on behalf of the respondent is that issuance of warning under Regulation 113 itself is enough to be considered as compliance of principles of natural justice, cannot be accepted. There is clear distinction between two notices, first notice is in the nature of warning to resume duty, failing which concerned employee renders himself liable to summarily discharged and the other notice (which is not provided in the Regulation 113) can be with regard to calling upon the defaulting employee to show cause why disciplinary action should not be taken under this Regulation. When the number of decisions referred to above of the Apex Court lay down that no automatic end to long standing service of a permanent employee can be ended before he reaches the age of superannuation without following the minimum principles of natural justice; any action without following it is bad in law. Thus, there is no hesitation for me to hold that the Regulation 113 is violative of principles of natural justice.

Passage from Apex Court's decision quoted above would also show that for want of compliance of principles of natural justice provisions like Regulation 113 have been described as arbitrary and discriminatory.

III Whether it is unreasonable.

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6. As seen above, there are two sets of provisions dealing with unauthorized absenteeism. There is fallacy between the two provisions and that is when the unauthorized absenteeism is considered as an act of default falling in the category of minor lapse and delinquency, the punishment that can be imposed is absolutely trivial, and the concerned employee has even got a right to appeal against order of punishment in case of imposition of fine of more than Rs.5/-. But when such absenteeism is neither act of misconduct nor it is considered to be a minor lapse or delinquency, remedy under Regulation 113 can be resorted to and the resultant effect is depriving person of his job causing his economic death. Thus in cases, even when the concerned employee has a valid and justifiable ground to remain absent, he has no chance to explain it and the consequence is very serious i.e. termination of service. Considering the facts of the present cases, it will be very clear that even when the concerned employee has been working on the permanent post for more than 20 years, his service can be terminated by following regulation 113 and the termination would be termed as simple discharge closing all the doors for the concerned employee. It is one thing to say that it is a simple discharge from service not stained with any stigma so as to cause no problem to the concerned employee in getting employment elsewhere. However, whether practically this is feasible when the person is driven to find out another employment say at the age of 45 years. What could be the prospects of such person getting an employment elsewhere is anybody's guess. Board will find the replacement immediately but the employee may not be able to have such job even for the rest of his life.

6.1. Mr. N.K. Majmudar, learned advocate appearing for the Board has placed reliance on a decision rendered in the case of Buckingham & Carnatic Company v/s. Venkatiah reported in AIR 1964 S.C. page 1272. The said decision is relied on by Mr. Majmudar to show that when there is a provision for automatic discharge, no procedure is required to be followed and secondly that there could be two sets of provisions dealing with the unauthorized absenteeism, one making an employee liable for automatic discharge from service without the necessity of proceedings and the other treating it as misconduct requiring compliance of the proceedings under the Conduct, Discipline and Appeal Procedure. In that case the Apex Court was required to consider section

73(1) and other provisions of the Employees' State Insurance Act, and Standing Order No. 8(ii). The said Standing Order deals with absent without leave and it reads as under :-

"Absent without leave: Any employee who absents himself for eight consecutive working days without leave shall be deemed to have left the Company's service without notice thereby terminating his contract of service. If he gives an explanation to the satisfaction of the management, the absence shall be converted into leave without pay or dearness allowance.

Any employee leaving the Company's service in this manner shall have no claim for re-employment in the Mills.

But if the absence is proved to the satisfaction of the Management to be one due to sickness, then such absence shall be converted into medical leave for such period as the employee is eligible with the permissible allowances."

In Regulation 113 there is no deeming fiction regarding termination of contract of service is provided nor it specifies the period of absence. While dealing with said Standing Order, the Apex Court has observed that -

"..... It is true that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. But where parties agree upon the terms and conditions of service and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing the relevant term itself. ..."

When there is no deeming provision regarding intention of terminating the contract of service, inference regarding abandonment of the service cannot be easily drawn. As the Apex Court has said that abandonment or relinquishment of service is always a question of intention and normally such an intention cannot be

attributed to an employee without adequate evidence. It is more than often said that intention is a state of mind, which can be gathered from the surrounding circumstances. For gathering such intention and appreciating evidence in that behalf opportunity of hearing is absolutely essential. In the instant cases the concerned employee had made their intention very much clear by lodging a protest against order of transfer outside circle and requesting the Board to send them back to their circle. When they did not join the service at the transferred post, the only intention that can be inferred is that he did not want to join the service at the transferred place and nothing beyond that. Despite that, Regulation 113 is used against them. However, in that case, in no uncertain terms, the Apex Court has observed, that the penal consequences of the second category are far more serious than the first category. As we have already seen so far the present case is concerned, it is just the other way round. This decision, therefore, will not render much help to Mr. Majmudar. On the contrary, a conjoint reading of various Regulations quoted above would show that employees who deliberately flout the Regulations and who are habitual offenders, who despite warnings do not improve their conduct and frequently keep on remaining absent without leave, are dealt with very leniently. Whereas a person facing genuine difficulty is removed from the service unceremoniously.

6.2. Thus, for the foregoing reasons, in my opinion, Regulation 113 is unreasonable.

IV. Whether it is against public policy and public interest.

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7. The Board is a mighty institution. It is an organization in which hundreds of employees are working all over the State. These employees would certainly deserve adequate protection of their employment. Thus, Regulation 113 is affecting large section of the public and for the reasons stated above, it is harmful and injurious to the public interest or it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good.

V. Whether it is unfair and unconscionable.

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8. It may be remembered here that by virtue of contract of service between the employee and the

Board, the employee enters the service of the Board and he is thereafter governed by the Regulations. However, on one side there is mighty organization; whereas on the other, there is an employee belonging to Class-III and IV. As already discussed above, when there is exercise of power under Regulation 113, at one stroke of pen the service of a permanent employee working for over 20 years is abruptly brought to an end without doing anything more. It is easy to say that it is a discharge simpliciter and no stigma is attached to the impugned order. However, the fact remains that such employee, in all probabilities, is not likely to get equally good job. As against that, the Board will within no time fill up the vacancy, as there is unending waiting at its door step for entry. Such provision, therefore, is against good conscious.

8.1. Ofcourse, the last two factors are more relevant for the purpose of determining the validity of a contract and they are in the realm of fulfillment of mutual contractual obligations, they are also interconnected with the previous three factors and they can as well be taken into consideration for deciding the validity of such Regulation vis-a-vis aforesaid provisions of the Constitution.

9. The aforesaid discussion will, therefore, in my opinion, render Regulation 113 as violative of Article 14 of the Constitution of India.

10. Regulation 113 is not only against the provisions of Article 14 for the reasons stated above, but also it is against Article 16(1) of the Constitution of India. Article 16(1) provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Undisputedly the Board is covered under Article 12 of the Constitution of India. It is well settled that words 'matters relating to employment' must include all matters in relation to employment, both prior and subsequent including the terms and conditions of service and such matters e.g. age of superannuation, termination of service, etc.

11. Under Article 21 of the Constitution of India the right to live has been provided. By now it is well settled principle of law that life is good, decent life to the citizen together with all the basic amenities and facilities such as livelihood, food, shelter, etc. When by virtue of draconic provision like Regulation 113, a person is rendered jobless and is deprived of his means

of livelihood. Such provision would create sense of insecurity in the employees. Certainly such provision would be violative of Article 21 of the Constitution of India also. Thus, in view of the aforesaid, the challenge to validity of Regulation 113 is required to be upheld by holding the said Regulation ultra-vires Articles 14, 16(1) and 21 of the Constitution of India and hence null and void.

12. The next question that is now required to be considered is that even while the act of the Board effecting discharge of the concerned employee from the service under regulation 113 was valid and it was discharge simpliciter, whether it amounted to retrenchment as defined under Section 2 (oo) of the I.D. Act and before effecting such retrenchment whether the Board was required to comply with the provisions of section 25-F of the I.D. Act? This question has been exhaustively dealt with by the learned Single Judge of this Court [Coram : H.K. Rathod, J.] in the case of G.E.B. v/s. Narayanbhai Kalubhai Bhamre in Special Civil Application No. 10441 of 2001 dated 19/03/2002. After considering various decisions of the Apex Court, the learned Judge has laid down as under :-

"14. However, lastly the contention raised by the learned advocate for Mr. Hasurkar that the Labour Court has come to the conclusion that such termiantion amounts to simpliciter and, therefore, such action of the petitioner Board falls within definition of "retrenchment" and, therefore, prior to termination, Section 25-F of the I.D. Act, 1947, is required to be followed by the petitioner Board and, therefore, the conclusion of the Labour Court is erroneous as the respondent workman remained absent and inspite of three notices, he had not reported and that is how the petitioner has exercised the powers under Service Regulation 113 of the Gujarat Electricity Board . So far this contention is concerned, in view of this Court, there are two type of terminations, one is by simpliciter and another by way of stigma or allegation. In case of simpliciter termination, which amounts to retrenchment within meaning of Section 2 (oo) of the Industrial Disputes Act, 1947. However, if services of the permanent employee has to be terminated and no stigma is attached against his termination or allegation is not foundation, then it amounts to retrenchment, then Section 25-F of the I.D. Act, 1947, is

> required to be followed, which is admittedly not followed in the present case. In case of termination based on misconduct or stigma is attached to termination, then departmental inquiry is condition precedent. On the case on hands, no reasonable opportunity was given to the respondent workman before terminating services of the concerned workman. Therefore, conclusion of the labour court that either the principles of natural justice by way of holding inquiry and giving reasonable opportunity to the respondent workman before terminating services or they should have to comply the provisions of Section 25-F of the Industrial Disputes Act, 1947, according to my opinion, it is correct conclusion arrived at by the labour court based on very well settled principles laid down by the Apex Court and, therefore, according to my opinion, the labour court has not committed any error in coming to such conclusion."

12.1. Counsels for the respondent have submitted that since petitioners have abandoned the service and brought an end to contract of service the respondent would be required to follow provisions of section 25-F because of section 2(oo) (bb) of the I.D. Act. In the decision in the case of Uptron India Ltd. (supra) the Apex Court has held that in such circumstances the discharge from service would amount to retrenchment requiring compliance of provisions of section 25-F of the I.D. Act and it would not stand covered under section 2 (oo) (bb) of the I.D. Act. This is a direct answer to respondent's contention. Admittedly, in the present cases the Board before discharging the concerned employee from the service has no authority under the provision of section 25-F of the I.D. Act. For that reason also validity of impugned orders cannot be sustained. Having discussed the common questions of law involved in these petitions, I will now deal with each petition on its facts

Special Civil Application No. 8587 of 1998 :-

13. I may first deal with Special Civil Application No. 8587 of 1998. The petitioner herein was working with respondent - Board as Junior Assistant since 1978. During the month of October 1993 the petitioner was transferred to a place called Bhatia and he, therefore, made a representation to higher authorities. After considerable efforts to persuade the Chairman of

the Board and the Member (Administration), request of the petitioner to retransfer him at Jamnagar i.e. within his Circle was accepted and the petitioner was retransferred to Jamnagar from Bhatia. The petitioner vide order dated 20th August, 1997 was again transferred out of his Circle i.e. from Jamnagar to a place called Kothara in Kutch district. The petitioner being aggrieved by the said order, filed Regular Civil Suit No. 379 of 1995, which according to him, is still pending before the Court of Civil Judge (S.D.). It appears that even thereafter, for a period of two months, he was allowed to perform duties at Jamnagar. It is the case of the petitioner that on 25th September, 1997 one Mr. Paresh Ranpara, Assistant Secretary of the Board, Jamnagar prevented the petitioner from signing the muster roll and he was also prevented from entering the office. He was thereafter not permitted to resume his duty at Jamnagar. All subsequent efforts to persuade the higher authorities to permit him to work at Jamnagar failed and so also the appeal filed by him before the Chairman against the order of transfer. On 27th January, 1998 he was served with a show cause notice calling upon him to show cause why his service should not be terminated. The said notice was received by the petitioner on 4th February, 1998, to which he submitted his reply. It is the grievance of the petitioner that without considering the said reply and without granting any opportunity of hearing to him, vide order dated 6th February, 1998 the service of the petitioner was terminated. His appeal against the order of termination was also turned down on the ground that no appeal was maintainable. The order of termination dated 6th February, 1998 was passed by SUPERINTENDING ENGINEER. (O & M) Bhuj.

13.1. It is the say of the petitioner that in the proceedings before the Civil Court challenging order of transfer, on behalf of the Board assurance was given by the advocate appearing for it, in view of letter dated 4th August, 1995 of the S.E. of the Board that the petitioner would be permitted to discharge his duty at the place where he was working on 25th July, 1995 till the disposal of the suit. It appears that only because of such assurance application for seeking interim injunction was withdrawn. It was thereafter the Board insisted that the petitioner should go to Kothara and work there. However, since the petitioner did not go there, his service was terminated. It may be noted here that the post of Junior Assistant is Class-III post and the petitioner had been working on that post since 1978.

13.2. At this juncture it is necessary to refer

to the order of termination of service dated 6th February, 1998 passed by the Superintending Engineer at Bhuj in Kutch Circle of the Board. It is stated in the said order that after relieving him from the duty on 20th August, 1997 upon his transfer to another place, he had not reported on duty at the transferred place. He was, therefore, given notice dated 12th November, 1997 to join the duty. However, he had failed to report at Kothara i.e. the place to which he was transferred. It is further stated that since he had failed to report at Kothara within the time prescribed by the Board, he was given another notice under regulation 113 calling upon him to join at Kothara vide notice dated 27th January, 1998. He was asked to resume duty at Kothara on or before 3rd February, 1998, but he had not done so. It is further stated that the petitioner had remained absent unauthorizedly and considering his conduct, it appeared that he was not interested in the job of the Board and, therefore, in accordance with the provisions of Regulation 113 of the Regulations, he was dismissed from the service.

14. Considering the aforesaid facts, it is clear that the petitioner, on two occasions, was transferred outside his Circle, once at Bhatia and on second occasion at Kothara in Kutch district. It was at Kothara that the petitioner did not join the duty despite notices issued by the Superintending Engineer. The question that is required to be considered in this background is what was the need of transferring the petitioner outside his Circle when the policy of the Board, as discussed above, is against such transfer and only in exceptional circumstances and that too after following certain procedure, such transfer could be effected. It is the say of the petitioner that there was ample documentary evidence to show that his work was appreciated by his immediate superior officer and that he had rendered commendable service in detecting largest number of theft of electricity and thereby the Board had earned considerable monetary benefit. It is the say of the petitioner that in the process he had displeased some of his superior officers, who made efforts to get rid of him any how. The Board has not come out with a definite case why he was required to be placed outside his Circle and whether any procedure as envisaged under the policy was followed. A faint attempt was made by the respondent Board to show that there was some material against the petitioner which required the Board to put him outside the Circle, but it has miserably failed to give proper justification for the same.

14.1. The say of the petitioner is that because he disclosed the secrets of some of his superior officers regarding their involvement with the persons who were indulging into theft of electricity, he was being victimized and harassed.

14.2. The aforesaid narration as well as the impugned order of dismissal from the service would clearly show how regulation 113 can be misused for victimizing an employee. The impugned order of terminating the service of the petitioner, if closely perused, would indicate that though it is based on regulation 113, it is an order of dismissal and not discharge simpliciter as envisaged under that regulation. Learned advocate of the Board Mr. Munshaw has tried to suggest that the word "dismissal" is loosely used, otherwise the rest of the contents of the impugned order would make it very clear that the power had been exercised under regulation 113. But considering the factual background in which this order has been passed, it is nothing but by way of a penal measure and the order clearly appears to be punitive in nature. In similar circumstances, learned Single Judge of this Court [Coram : Coram : H.K. Rathod, J.] in Special Civil Application No. 10251 of 2001 in the case of G.E.B. v/s. Girishbhai Valjibhai Chudgar, while considering the order passed under this very provision i.e. regulation 113, has not given any different meaning to word "dismiss" and has held that the concerned employee of that case was dismissed from the service for the alleged misconduct of remaining absent. The Division Bench also in the Letters Patent Appeal No. 652 of 2002 filed against the aforesaid judgment of the learned Single Judge, on 2/7/2002, has held that when there is order of dismissal, the procedure prescribed for passing such order and principles of natural justice are violated. It had therefore, quashed and set aside the said order with an observation that it was open for the Board to follow the requisite procedure and pass appropriate order in accordance with law. Thus, in the instant case also it was an order of dismissal and the respondent-Board was required to follow the procedure prescribed under the Conduct, Discipline and Appeal Rules before passing such order. Admittedly, that had not been done. The impugned order, therefore, is required to be quashed and set aside.

14.3. The aforesaid case of this petitioner clearly projects in what manner regulation 113 can be misused and how it is discriminatory. First of all despite an appreciation of his service by his immediate

superior officer, he was twice thrown out of the Circle against the Board's own policy, apparently because he was an eyesore to some of the officers. The second aspect is that despite the assurance having been given to the competent Civil Court to continue the petitioner at Jamnagar and thereupon making him to withdraw the application for interim relief, within short time he was prevented from performing his duty at Jamnagar and was asked to go to Kothara in Kutch district. Thus, the officers had gone to the extent of even not honouring the assurance that was given to the Court with a view to see that the petitioner was driven out of the Circle to a distant place in Kutch district. Further that when the petitioner lodged the protest and did not resume at Kothara, it was considered to be unauthorized absenteeism and recourse to Regulation 113 was taken. There was no intention on the part of the petitioner to abandon or relinquish the service. When in these circumstances the petitioner had expressed his willingness to work at Jamnagar, it was difficult to comprehend why such absenteeism was considered as an 'intention to abandon the service of the Board.' This aspect has been dealt with by me in detail only with a view to show what mischief can be played under the guise of exercising power under this regulation and what scope it gives to the dissatisfied officers to get rid of unwanted employees without following the regular procedure.

Special Civil Application No. 3326/1998 :

15. In this petition the petitioner was working on Class-III post and was working in the Board's office in City Division at Jamnagar. He joined the service in 1980. He thereafter was transferred from City Division to Central Zone Sub-Division, Jamnagar on 26th January, 1997. While he was working there, a prosecution was filed against him and other employees of the Board under the provisions of Bombay Prevention of Gambling Act for carrying on gambling activities within the premises of the Board. He was therefore, transferred by the Board vide office order dated 4th March, 1997 outside Jamnagar Circle Office alongwith other employees. He and others made joint representations dated 6th March, 1997 and 25th March, 1997 to retransfer them to their own Circle, but the representations were never replied to. The Criminal Case No. 514 of 1997 filed against the petitioner and others resulted into their acquittal vide judgment and order passed by the learned Judicial Magistrate First Class at Jamnagar dated 28th May, 1997. In view of the order of acquittal, all the employees except the present petitioner were brought back to Jamnagar Circle office

vide order dated 11th August, 1997. The petitioner was not given that benefit. The petitioner's request was turned down for non-obvious reason. The petitioner on 11th August, 1997 received the notice which was issued by the Superintending Engineer, Bhavnagar, where the petitioner appears to have been transferred, under regulation 113 calling upon him to join service at the said place and the petitioner replied to the said notice vide reply dated 14th August, 1997. It is the grievance of the petitioner that despite the reply, without taking the same into consideration, the respondent passed order of termination of petitioner's service on 10th February, 1998. It is interesting to note that the petitioner was not served with any direct notice but the said order was published in the newspaper dated 10th February, 1998 wherein it has been stated that despite the notices dated 31st March, 1997, 21st May, 1997, 24th June, 1997 and a public notice dated 11th August, 1997 calling upon him to report for duty at Bhavnagar, he had not done so and, therefore, the procedure required under regulation 113 was required to be followed. It is further stated that in accordance with regulation 113 he was discharged from the service with effect from the same date i.e. 10th February, 1998. It may be noted that all the notices except notice dated 11th August, 1997 were prior to retransfer of other employees in their own circle i.e. Jamnagar by order of the same date. Notice dated 11th August, 1997 was not even directly served but it was published in the newspaper. Petitioner's explanation dated 14th August, 1997 was not accepted by the Board, however, no intimation to that effect was given to him.

15.1. In view of the aforesaid facts, the present case is also a glaring example of arbitrariness and high-handedness of the superior officers. One can understand the initial transfer from Jamnagar to Bhavnagar on account of the criminal prosecution which was pending against the petitioner, but when the said prosecution resulted into acquittal and when all the other employees who were similarly situated, were brought back to Jamnagar, what was the earthly reason for not retransferring the petitioner to his original post in Jamnagar and why the Board insisted that he should go to Bhavnagar and resume duty. The petitioner, as stated above, had made two representations, but the same were not replied to. He had also given his reply dated 14th August, 1997 to the notice dated 11th August, 1997, but it was discarded solely on the ground that the explanation was not satisfactory. One, therefore, fails to understand that when the petitioner had been acquitted and when he was entitled to be retransferred alongwith

other employees, why the Board insisted that he should work at Bhavnagar and when the petitioner struggled to get justice, his absence at Bhavnagar was considered to be unauthorized absenteeism requiring Board to resort to regulation 113 and to relive him from the service. Since the Board has not made out any case justifying the discriminatory treatment meted out to the petitioner, it is obvious that this was nothing but arbitrariness and high-handedness of the superior officers and the service regulation 113 was resorted to get rid of the petitioner easily. Such arbitrariness cannot be permitted and this impugned order can be quashed on that ground alone.

Special Civil Application No. 1548 of 1998 :

16. In this case the petitioner was working in Palanpur Circle Office, but he was transferred to Radhanpur Sub-Division and he was thereafter transferred to Deesa Rural Sub-Division vide order dated 26th August, 1996 and from there to Halvad Sub-Division in Surendranagar Sub-Division office. In this case also the petitioner was an employee of Class-III. He, therefore, made representation to the higher authorities expressing his difficulties and the hardship that was likely to be faced by him. He also brought it to the notice of the concerned authority that the Executive Engineer with a view to harass him, has made false reporting against him so as to get him transferred out of his Circle and he has also expressed an apprehension that if he is transferred, his family would get ruined. Such representations were made on 18th January, 1997 and 4th February, 1997. It may be noted that in both these representations he had made it clear that he was willing to work in his Circle. The Board vide order dated 4th February, 1997 treated the absence of the petitioner at the transferred place as unauthorized absence and resorted to regulation 113 stating that considering his entire past record and since he had remained absent without leave from 26th August, 1996, he was liable to be relieved summarily from the service and accordingly he was relieved with immediate effect by virtue of regulation 113.

16.1. It is a matter of surprise that a class-III employee working as Lineman, inspite of the aforesaid policy, has been transferred from one place to other out of the Circle on three occasions, no plausible explanation has been offered. As against that, the petitioner has made a precise allegation against the Executive Engineer under whom he was working. It, therefore, provides ample scope to infer that the transfer was for the reasons other than the reasons mentioned in the policy and that too on three occasions

in different Circles. If in these circumstances, when the employee remained absent at the transferred place, regulation 113 is resorted to to get rid of him. It may be noted here that the present order is passed not only on the ground of unauthorized absence but after taking into consideration overall service record of the petitioner. If that be so, this order cannot be terms as discharge simpliciter in accordance with regulation 113 and it is punitive in nature, for which the respondent is required to follow the required procedure before bringing end to his service. That has not been done. This is also a glaring instance how in an arbitrary way the Regulation 113 can be resorted to.

Special Civil Application No. 9492 of 1996 :

17. In this case the petitioner was, at the relevant time, working as Line Inspector at Construction Sub-Division, Anjar under the Construction Division, Rajkot. From there he was transferred to 66 K.V. Sub Station, Kandala under Anjar Transmission Division vide order dated 18th July, 1995. At that time the petitioner was also office bearer of Gujarat Vidyut Technical Karmachari Mandal and was a protected workman. He, therefore, made an application/representation dated 7th August, 1995 making some grievances against his transfer. He was, therefore, brought back to Anjar Circle Office as Senior Technician at Anjar Construction Sub Division. However, the petitioner and the aforesaid union were not satisfied with the modified order of the transfer and, therefore, they made further representations. In the meanwhile the Superintending Engineer issued notice dated 22nd December, 1995 calling upon the petitioner to report for duty immediately. That notice was replied to by the petitioner on 22nd January, 1996. Another notice dated 24th January, 1996 was received from Superintending Engineer by the petitioner calling upon him to report for duty on or before 30th January, 1996. He gave reply to the said notice by letter dated 31st January, 1996 to the Chairman of the Board and vide letter dated 6th February, 1996 to the Superintending Engineer and also forwarded necessary documents and certificates. However, on 13th February, 1996 service of the petitioner was terminated. The impugned order shows that because the petitioner had not reported for duty within the stipulated time i.e. 30th January, 1996, he was discharged from the service with immediate effect in accordance with Regulation 113 and his name was placed in black list. The provisions of Regulation 113 which have been reproduced verbatim above, nowhere authorizes the Board to place the concerned employee in black list. Inspite of that, in the instant case, the petitioner has been blacklisted. This order,

therefore, carries stigma with it and without hesitation it can be said that it is punitive in nature. When that is so, the respondent was required to follow the procedure under Conduct, Discipline and Appeal Rules. Admittedly that has not been done. This order is, therefore, bad in law.

Special Civil Application No. 9461 of 1996 :

18. In this case the petitioner had applied for leave but before any decision could be taken on the same, she left India for going abroad. It appears that she had made an application from there for extension of leave. However, the entire period was taken to be unauthorized absenteeism and order under Regulation 113 was passed.

18.1. Considering the facts of this case, even if it is assumed that the order was of discharge simpliciter, then also it was a retrenchment under section 2 (oo) of the I.D. Act requiring compliance of Section 25-F of the I.D. Act. Admittedly, that has not been done and the same is, therefore, bad in law and is required to be quashed and set aside.

19. In the result, for the reasons stated above, all the petitions are allowed. The impugned orders of termination of services of the petitioners in all cases are quashed and set aside, with direction that they are required to be placed on their original posts with continuity of service within three months from the date of receipt of the writ of this judgment. Rule made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

So far as the backwages are concerned, in this petition there is no material before me to decide that question. However, it will be open for the petitioners to agitate that question before the appropriate forum and the other side will also have a chance to contest the said claim. It is also made clear that before such forum, both the parties will be entitled to lead appropriate evidence.

[AKSHAY H. MEHTA, J.]

* Pansala.